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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1892

BILL MILES SKILLMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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REASONS FOR GRANTING WRIT OF CERTIORARI

Comes now petitioner, and by his attorney of record, Kenneth K. Simon, files this Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, for the following reasons:

That on the 30th of April, 1971, the United States Court of Appeals for the Eighth Circuit in Cause No. ....., and styled U.S.A. v. Bill Miles Skillman, affirmed the judgment and sentence of the United States District Court for the Western District of Missouri wherein petitioner was charged with and tried on an indictment returned in six counts charging petitioner and others with violations of 18 U.S.C. 371, 18 U.S.C. 3215, 18 U.S.C. 641, 18 U.S.C. 2315 and 18 U.S.C. 641. And wherein petitioner was found guilty on one count of violation of 18 U.S.C. 371 and two counts of violation of 18 U.S.C. 641, the former being conspiracy to violate 18 U.S.C. 641 and the latter being the receipt of property under 18 U.S.C. 641.

Review is sought hereunder pursuant to the provisions of Title 28, Section 1254, United States Code.

The opinion below, a copy of which is appended hereto, held that there was no error in permitting the Government to establish the existence of a conspiracy by merely adducing evidence of a buyer-seller relationship between the petitioner and others.

It was further held that no error was committed by the Government in failing to disclose and make available for the defense certain tape recordings prior to trial. Further, it was held that there was no error in permitting the Government to introduce for impeachment purposes the aforesaid tape which was garbled and unintelligible in parts and which had been obtained as a result of a conversation with petitioner and a co-conspirator initiated from the Office of the U.S. Marshal by said co-conspirator at the behest of the Government at a time when the appellant had become the focus of the Government's investigation and at a time when it was apparent that the Government intended to rely on the testimony of said co-conspirator.

It was further held to be no error to permit the trial court, in its final charge to employ such language to the jury so as to imply that the jury had but two alternatives as to verdict: either to convict or to acquit when in fact there exists an implicit third alternative of no verdict due to lack of unanimity.

It was further held that there was no error in the trial court's refusal to compel a psychiatric examination of the Government's chief witness who had an extensive history of drug abuse and criminal involvement.

It was further held to be no error to permit the Government to prosecute the petitioner under a conspiracy count and the substantive count when both counts were embraced in and arose out of the same single transaction.

STATEMENT OF THE CASE

On August 26, 1969, petitioner herein was found guilty by a Jury in the United States District Court for the Western District of Missouri, Western Division and sentence was imposed on October 2, 1969 in accordance with the above.

The petitioner was indicted by a Federal Grand Jury which returned an Indictment in six counts, as follows: Count I, charging petitioner and others with violation of 18 U.S.C. 371, Count II, violation of 18 U.S.C. 3215, Count III, violation of 18 U.S.C. 641, Count V with a violation of 18 U.S.C. 2315 and Count VI with a violation of 18 U.S.C. 641. Petitioner was not charged under Count IV. Counsel in this case was retained.

The record reflects that the following evidence was adduced: That Thomas Gerald Tarpley, called on behalf of the Government testified that he was the Assistant Superintendent of the Station C branch Post Office at Atlanta, Georgia, that on February 20, 1967 he left the said

post office at 7 o'clock, that the building was empty and that he secured the same, that upon entering the building the following morning, at about 5:30 A.M. he noticed that the vault door had been cut and certain interior doors forced. Newton Swart testified that he was employed as a carrier at Atlanta Station C, aforesaid, during February, 1967, arrived at said Station at about 3:20 A.M. Upon his arrival, he noticed a hole burned in the safe, a crowbar and acetylene tank and thereupon called his supervisor and a postal inspector. Mr. Joseph Vineyard, employed by the Atlanta Post Office as Chief Finance Examiner testified that upon being called to Station C, Atlanta, February 21, 1967 and proceeded with an audit of the fixed credit of said station and discovered a shortage of $56,717.18.

Carlton Moore, being called by the Government testified that he was a dispatcher at the Florence, Alabama Post Office and so employed on March 7, 1967. On that date, he worked from 1:00 P.M. to 10:00 P.M. securing the doors and windows as he left and that the building was empty and locked. Meredith Daugherty, called on behalf of the Government testified that on March 8, 1967 he arrived at the Florence Post Office at about 5:00 A.M. to begin his duties as a general mechanic, that upon entering the building he noticed as he entered the office of the Assistant Postmaster that cabinets were unlocked and that he smelled the odor from a torch and noticed a hole in the safe therein situated. Mr. Donald Holt, the Postmaster at Florence, Alabama, testified that on March 8, 1967 he arrived at said post office at 5:30 after receiving a call from Daugherty, that he called the office of the Postal Inspector in charge in Chattanooga, Tennessee and the Postal Inspector in Decatur, Alabama, Mr. Railey.

Upon his arrival, Mr. Holt noticed cabinets had been forced and a hole cut in the vault located in the Assistant

Postmaster's Office. That upon gaining access to said vault later that morning, he made an inventory of its contents and those of the post office and discovered a shortage of $107,620.42 in stamps and money.

Mr. J. B. Rigney, Decatur, Georgia, upon being called by the Government testified that he was employed as the manager of Howard Johnson's Motor Lodge and was so employed for the preceding five years. Government exhibit 22 being a registration card and folio for said Motor Lodge and reflecting the guest statement and register of one William McCall for 10 March, 1967 and leaving the 11, was introduced together with the record of a telephone call made from said Motor Lodge and introduced as Government exhibit 63. Mr. Lewis Ostrander, being called by the Government testified that he was employed by the Holiday Inn in Independence, Missouri that on March 8, a party of three checked into said motel, the registration card bearing the name of Bill Taylor.

Wayne R. Richie, being called on behalf of the Government testified that he was employed as a Postal Inspector and in the course and scope of that employment did investigate the burglary and disposition of the proceeds therefrom from the Atlanta C Station and the Florence, Alabama post office made identifications of the foregoing exhibits and indicated that the same had been acquired on information from the witness, Knight.

William Knight, being called on behalf of the Government, testified that he had six prior felony convictions and was a former narcotics user although he hadn't used narcotics since 1960, that he was acquainted with the defendants on trial and made identifications of them. He further testified that he and Lewis had been involved in several burglaries together, that he was the owner of a 1964 Chrysler, license No. 28965, Alabama, that on 20

February, 1967 he proceeded from Wildwood, Florida, with defendant Lewis and drove to Atlanta, Georgia for the purpose of burglarizing Station C Post Office, that he and the defendant Lewis checked into a Ramada Inn at Chamblee, Georgia, Lewis using the name of Bill Tarver, the same being a suburb of Atlanta. Later that night, he and Lewis proceeded to the post office aforesaid, and proceeded to gain entry and cut a hole in the vault therein situated and proceeded to remove the contents from the vault. They then went back to the motel and proceeded to sort the articles removed from the vault, placing certain of the property aforesaid in a trunk purchased for that purpose and some army laundry bags, whereupon he called Mr. Bob Matthews, in Omaha, Nebraska and discussed the sale of the stamps stolen on the basis of a prearranged deal, that they left Atlanta proceeding toward Omaha in accordance with Matthews' instructions, with the stamps in their possession, driving toward Memphis, Tennessee. En route, and in the company of Bernie Lewis they received instructions from Matthews that they were to proceed to Kansas City and advise him when they arrived. Calling from Columbia, Missouri, they were advised to proceed to Chicago, where they checked into the Caravelle Motel located in a suburb of Chicago. The following morning they called Matthews and arranged to contact a party in Chicago to dispose of a portion of the stamps. After this transaction, they left for Kansas City after first contacting Matthews. Upon arrival, they checked into the Holiday Inn in Kansas City, Kansas, under the name of Allen Taylor. The following morning they once again contacted Matthews in Omaha and were given the number of a party to contact in Kansas City, being number VI 2-1777 and ask for Bill. He was given a building address and room number, 707 in the Rialto Building and that prior thereto he had called the number VI 2-1777 for the address and

room number above and that said number was by stipulation agreed to be that of Continental Investments, Inc. Upon arriving at that address, he parked his car on Grand, leaving Lewis in the car and went into the building to room 707 where he entered negotiations with Bill Skillman for the stamps. After a short while, he left the building to discuss the proposition with Bernie Lewis, then returned to finalize their transaction. The stamps were then carried to room 707 in said building still boxed in a footlocker and green army laundry bags and a part payment of $4500.00 was made and then left via airplane, after making arrangements to return to Kansas City for final payment and that the same was made by Mr. Skillman, in accordance with said arrangements, and left Kansas City by car driving through Florence, Alabama there apprising himself of the possibility of burglarizing the post office therein situated. He then returned to Atlanta, Georgia, and contacted Lewis for purposes of making final payment to Lewis of his share of the proceeds, and discussing the trip with him. Upon Lewis's arrival at Knight's home for payment they discussed the possibility of burglarizing the Florence, Alabama Post office with A. Y. Smith, and proceeded to Florence, Alabama, where Lewis, Knight and Smith burglarized the post office removing stamps and money. They then left Florence, Alabama, contacted Matthews from Arkansas and were instructed to go to Kansas City. Upon their arrival, Knight contacted Mr. Skillman and made arrangements to see him the following day. They then purchased two footlockers in which to place the stamps and loaded the stamps into said footlockers and green army laundry bags which they had. Knight again contacted Skillman and made arrangements for the sale and delivery of said stamps, receiving part payment then and reaching an understanding as to the balance due. Knight later returned to Kansas City to

receive final payment, which was later divided among the three men.

Rufus Russaw, being called on behalf of Mr. Bill Skillman, testified that on February 24, 1967, he saw Mr. Skillman in his office at the Rialto Building at about 12:30, in regard to the purchase of some property. At about 1:15, they left and drove to several pieces of property, consuming about two hours of time. At about 3:30, they returned to Ninth and Grand, where Mr. Russaw parted company with Mr. Skillman.

Stanford Katz, called as a witness on behalf of Mr. Skillman, testified that he was an attorney in Kansas City, that he was the son of Jerry Katz, and that to his knowledge his father used the office of Mr. Skillman in the Rialto Building for the conduct of certain business and that he had been in said offices on two occasions with his father, alone, and that one of those occasions was on 24 February, 1967 at about 2:30 in the afternoon. He further testified that his father was a stamp and coin dealer, and that the occasion of that last meeting was an effort by his father to raise money. Mr. Katz testified that he had on several occasions called his father at numbers assigned to Mr. Skillman's enterprises and left messages which were later returned by his father.

Maude Hackett, being called on behalf of Mr. Skillman, testified that she was employed part time by Mr. Skillman during the period of February, 1967, usually working during the lunch hour. She stated that to her knowledge, Mr. Jerry Katz did have a key to Mr. Skillman's offices, and that she was able to identify him from his photograph (Defendant's exhibit 2), and that he was "in and out" of said premises. She testified that in addition to Mr. Skillman, Mr. Frank Roder had a key to said premises, as did Mr.

Jerry Katz and Mr. Don Gilliland and Mr. Blosser, and further that said persons had, readily available, access to the answering service maintained for said offices. On occasion, Mr. Jerry Katz occupied said offices alone, without Mr. Skillman. She was unable to identify Lewis or Knight as having ever been in Mr. Skillman's office.

Nancy Skillman, wife of the petitioner, being called on his behalf, testified that on February 24, 1967, the petitioner arrived at the family home slightly after 4:00 in the afternoon. Mr. Skillman, being called to testify in his own behalf, stated that he had been in business at 906 Grand Avenue for 17 years, generally in the mortgage and real estate loans field, and that said address was that of the Rialto Building. He occupied Room 707 therein in 1967, the same being rented by his company. There were several individuals who had keys to said premises and access to the offices therein, among them Mrs. Hackett, Don Gilliland, Frank Roder, Frank Blosser and Jerry Katz, the latter person making frequent use of said premises. He maintained telephone service on behalf of his companies to those premises through VI 2-1777 and VI 2-4232 during the period in question in addition to which he had an answering service provided by Anserphone for the VI 2-4233 and VI 2-4232 numbers, but not for VI 2-1777. His records reflect a call made to Omaha, Nebraska, 402-556-2340 on February 8, 1967 from his office (Defense exhibit D 10-562), that number being used to provide service for Mr. Robert Matthews, to his personal knowledge from his prior business dealings with said person in connection with Marshall Auto Stores, but that he did not place the call in question on the date set forth. On February 24, 1967, Mr. Skillman arrived at his office around 9:00 A.M., spoke with Frank Roder and Jerry Katz who arrived about 12:00 after which, about 12:30-1:00 he left the office accompanied by Rufus Russaw to look at property. They re-

turned to the downtown area near the office sometime around 3:30 P.M. He specifically denied making any payment to Mr. Knight on February 24, 1967. Further he had no contact with Knight at any time, for any purpose nor did he receive a call from Knight in March 1967 relating to merchandise or goods for sale. The following morning, the 25 February, 1967, he left via Braniff for Des Moines, returning the 26th. He stated he had no contact with Knight March 1, 1967. On March 9, 1967 he conducted general unspecified business affairs but did not speak to Mr. Knight, nor did he contact Mr. Knight for any purpose. He did not meet with Amis Young Smith or Bernie Lewis on March 9, 1967. On March 14 of that year, he met several people, but did not have any contact with Knight. He had no memory concerning Government exhibits 82 or 83, nor of having a key to Mr. Browning's office, and has never had a key to a private storage area in his building. The only dealings he has had with Matthews were in connection with certain auto stores and the insurance thereof.

On cross-examination, Mr. Skillman reiterated his statement that he had never had contact with Knight and that he had never talked to Knight nor had he ever met Lewis. He further stated that he had never spoken to Knight on the telephone.

Wayne R. Richie, being recalled by the Government, testified that on November 24, 1967, having first secured permission from his supervisors he procured, from the U. S. Marshal's office in Tampa, Florida, a telephone call from Mr. Knight to Mr. Skillman. He (Richie) initiated the idea of having the call made by Knight, the same being charged to his (Richie's) office credit card. The call was interstate, the receiving party (Mr. Skillman) was not aware the conversation was being taped, the taping medium being an IBM portable dictating machine specially equipped. After

the said conversation was recorded, Mr. Richie retained possession of it, delivering a tape to a secretary for transcription and a copy to the U. S. District Attorney's Office. Objection to the introduction of said tape was made and overruled. The call was made to VI 2-1777, in Kansas City, Missouri and a conversation ensued between the parties, one of whom was Mr. Knight, with Mr. Richie and the recording device heretofore mentioned also listening and introduced in the form of an IBM recording belt as exhibit 92 and played for the jury, said admission being solely for impeachment purposes. Mr. Richie played said tape for the jury, but the transcript reflects that the original playing was inaudible to the reporter, and a later playing at the close of the proceedings was had for the record as follows:

"Operator: Operator.

Mr. Knight: I'd like to . . . (unintelligible) Kansas City, Missouri, Area Code 913, right?

Operator: I don't know. What was the city?

Mr. Knight: Kansas City, Missouri.

Operator: 816.

Mr. Knight: 816 . . . (unintelligible).

Operator: Let's see. 816.

Mr. Knight: Victor 2-1777.

Operator: Thank you.

Mr. Knight: And my number, Operator, is . . . (unintelligible) 425-848-5180. Operator, . . . (unintelligible) 425-848-5180.

Operator: I'm sorry, sir, I didn't get—I got 425 but I didn't get the last.

Mr. Knight: 845—I mean 848-5180.

Operator: Thank you.

Mr. Skillman: Victor 2-1777.

Mr. Knight: Hello, Bill?

Mr. Skillman: Yeah.

Mr. Knight: This is Bill.

Mr. Skillman: Bill?

Mr. Knight: Yeah.

Mr. Skillman: Bill who?

Mr. Knight: Knight.

Mr. Skillman: Huh?

Mr. Knight: Bill Knight.

Mr. Skillman: Bill Knight?

Mr. Knight: Yeah.

Mr. Skillman: How are you, Bill?

Mr. Knight: Not very good.

Mr. Skillman: What's the matter with you?

Mr. Knight: I'm in jail.

Mr. Skillman: You're in jail?

Mr. Knight: Yes, been in jail for some time. I didn't know . . . (unintelligible) or not and I hated to phone you.

Mr. Skillman: I hate for you to, also.

Mr. Knight: And maybe—got to get out of this cage with bond.

Mr. Skillman: Yeah, well, of course, we're in bond business, Bill.

Mr. Knight: Yeah, I know.

Mr. Skillman: Where are you?

Mr. Knight: In Tampa. In the county jail in Tampa, Florida, Hillsborough County Jail.

Mr. Skillman: Tampa, Florida.

Mr. Knight: $25,000 bond on a federal charge.

Mr. Skillman: Hillsborough County, Georgia?

Mr. Knight: No, Florida—Tampa jail.

Mr. Skillman: Yeah, I know. Hillsborough County.

Mr. Knight: Yeah.

Mr. Skillman: Well, who is your lawyer?

Mr. Knight: Name of Ed Kirkland.

Mr. Skillman: Ed what?

Mr. Knight: Kirkland.

Mr. Skillman: Where is he located?
Mr. Knight: He's located in Orlando.
Mr. Skillman: He's in Orlando?
Mr. Knight: Yes. Ed was . . . (unintelligible).
Mr. Skillman: $25,000 bond, huh?
Mr. Knight: Yes.
Mr. Skillman: What's the charge?
Mr. Knight: . . . (unintelligible) Dyer Act.
Mr. Skillman: Is what?
Mr. Knight: Dyer Act.
Mr. Skillman: Dyer Act.
Mr. Knight: Federal . . . (unintelligible) Dyer Act.
Mr. Skillman: Well, I don't know either . . . (unintelligible), Bill, . . . (unintelligible) I was . . . (unintelligible). Where are you calling from?
. . . (unintelligible).
Mr. Skillman: Well, I'm sure your lawyer could get ahold of him. Get the—do about . . . (unintelligible) for it and—maybe he can come up with an idea for it. Well, I'll see what I can do. Well, it's all right."

Mr. Skillman, called for surrebuttal, stated that he had made an effort, after hearing the above tape, to pinpoint the conversation therein set forth. His telephone records reflected that he received such a call and provided a cursory record of the calling party's first name, the place whence the call came, and the fact that the said party was charged with Dyer Act violation and a few extraneous notes. He stated that it was apparently his voice which was on the tape, but that were it not for his notes and the fact that his attention was directed specifically to this conversation, he would still have had no recollection that this conversation took place, and further, that despite the fact he occasionally provided security for authorized sureties, he performed no services for Knight and that at the

time Knight called, the name meant nothing to him. Both sides rested. The Government dismissed Counts 2, 4, and 5 leaving Counts 1, 3, and 6 for jury submission.

ARGUMENT

I

The opinion of the Eighth Circuit Court of Appeals in this matter conflicts with the Seventh Circuit Court of Appeals in the case of *U. S. v. Ford*, 324 F.2d 950 (1963), wherein the court stated that while formal proof of conspiracy was unnecessary in that a conspiracy may be proved entirely from circumstantial evidence and concerted action toward a common goal that "the relationship of buyer and seller, absent any prior or contemporaneous understanding beyond the mere sales agreement does not prove a conspiracy to sell, receive, barter or dispose of stolen property, although both parties know of the stolen character of the goods. In such circumstances the buyer's purpose is to buy, the seller's purpose is to sell. There is no joint objective." The evidence in the petitioner's case reflects the role of petitioner as being at best a convenient and ready purchaser for a portion of certain stolen property on a purely casual basis with neither party having entered into an agreement or understanding with the other, either express or implied so far as the larger scope of the offense embraced in the charge of conspiracy is concerned.

It was held by the trial court that there was no error in permitting the government to establish the existence of a conspiracy by merely adducing evidence of a buyer-seller relationship between the petitioner and others.

II

The opinion of the Eighth Circuit Court of Appeals further held there was no error with respect to two aspects of the Government's managing of the matter of the tape recordings. The tape in question was the product of a conversation initiated at the behest of the Government by the Government's witness in chief, the accomplice Knight and made from the Office of the U.S. Marshal in Tampa, Florida to the petitioner. The petitioner at trial took the stand in his own defense and denied any contact with the witness Knight.

Whereupon the Government introduced a tape of the aforesaid conversation for impeachment purposes. Appropriate cautionary instructions with respect to this tape were given, however petitioner feels that the ruling of the Eighth Circuit Court is in conflict with the ruling of this court and other circuit courts in several particulars. Firstly, with respect to discovery of said tape, the petitioner moved on June 23, 1969 for the production and disclosure of all evidence favorable to the petitioner and on June 26 the court made its order directing the production of any written or recorded statements made by the defendant, whereupon the Government affirmatively stated it was not possessed of any such statement. The Eighth Circuit asserted that such tape was not a relevant statement pursuant to the provisions of Rule 16 as it was introduced as impeachment material and not for the purpose of any substantive proof. The petitioner relied on the cases of *Davis* v. *U. S.*, 413 F.2d 1226 (5th Cir. 1969) and *United States* v. *Crisona,* 416 F.2d 107 (2nd Cir. 1969, cert. den.) for the proposition that such tape recordings are discoverable, a rule distinguished in the instant case by the Eighth Circuit Court of Appeals on the facts.

The petitioner further urges that the Eighth Circuit erred in refusing to follow the dictates of this court with respect to the cases of *Katz* v. *U. S.*, 389 U.S. 347 (1967) and *Massiah* v. *U. S.*, 377 U.S. 201 (1964), with respect to the petitioner's rationale that the recorded conversation itself made under the circumstances present in the instant case, that is, at the behest of the Government and initiated by a man upon whom the Government intended to rely to make its case and directed to a man who had become the focus of prosecution interest, such conversations and recordings were in derogation of petitioner's rights under the Fourth Amendment to the U. S. Constitution. The Eighth Circuit further rejected the rationale of the Seventh Circuit in the case of *U. S.* v. *White*, 405 F.2d 838 (7th Cir. 1969), wherein that court relying on the *Katz* decision, supra, determined that a radio KEL set transmission between the defendant and a Government informer was in derogation of the Fourth Amendment. The interception in this case is analogous.

III

The petitioner urges that the Eighth Circuit Court of Appeals erred in holding that no error was committed by the trial court's failure to compel psychiatric examination of the Government witness Knight. There was evidence of Knight's addiction to narcotic drugs and further evidence of extensive criminal involvement for much of his life. The Government relied extensively on Knight's testimony to make its case against petitioner.

The burden of establishing incompetence rests with the party throwing questions of competence open to scrutiny. In view of this burden placed on petitioner, petitioner should be able, in order to intelligently meet this burden, to avail himself of the implied power of the court to order

such examination of a mental or physical nature required to determine the issue of competency.

IV

The Eighth Circuit rejected the petitioner's argument with respect to the final charge in which petitioner contended that, firstly, the charge was coercive in that it apprised the jury of only two alternatives that of "Guilty" verdict or "Not Guilty" verdict and failed to touch upon the possibility of a hung jury. In so doing, the Eighth Circuit rejected the rationale of the Third Circuit in the matter of *U. S.* v. *Fioravanti*, 412 F.2d 407 (3rd Cir. 1969), cert. den. 396 U.S. 837 (1970), wherein the court noted the existence of three possible verdicts, guilty, not guilty and no verdict at all and further noted that charges of the Allen type as given would not be tolerated in the future, although the court refused to reverse in the *Fioravanti* case itself. The clear conflict and lack of definitive and uniform standards renders this area a major source of difficulty in the area of criminal jurisprudence.

V

It was further held by the Eight Circuit Court of Appeals that no error was committed by permitting the Government to proceed against the petitioner both on the substantive count and the conspiracy count set forth in the indictment. It is the position of the petitioner that in the instant case the conspiracy and the substantive offense alleged against petitioner arose out of and were embraced within the same single transaction and that therefore, the Government is precluded from maintaining a separate prosecution on both such counts.

The petitioner urged below that the Government's position presupposes that the successful perpetration of the goals of the conspiracy and the conspiracy itself remain

separate and distinct from each other, a logically untenable situation. The petitioner urges that in cases where the accused acts as a principal both in the conspiracy and the successful perpetration of the substantive offense, these become merged. That is, the active, or substantive offense, once completed, merges with the passive or conspiratorial offense at least in such instances where the principals are the same. The Eighth Circuit Court of Appeals in rejecting this argument rejected the rationale of the cases of *Waller* v. *Florida*, 90 S. Ct. ..... (1969) and *Ashe* v. *Swenson*, 90 S. Ct. ..... (1969), wherein this court adopted the reasoning of the so-called "same transaction" test, rejecting the prior rationale of the "same evidence" test, in such cases.

Wherefore, petitioner respectfully prays that this court grant a writ of certiorari to the United States Court of Appeals for the Eighth Circuit, and for a review of the questions involved herein.

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